CASE NO. 14-5800
IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA **PLAINTIFF-APPELLEE**

VS.

ROCKY HOUSTON **DEFENDANT-APPELLANT**

On Appeal from the United States District Court
Eastern District of Tennessee at Knoxville
CASE NO. 3:13-cr-00009

PETITION FOR PANEL REHEARING AND REHEARING *EN BANC*

STEVEN R. JAEGER (KBA 35451)
THE JAEGER FIRM PLLC
23 Erlanger Road
Erlanger, Kentucky 41018
TELE: (859) 342-4500
EMAIL: srjaeger@thejaegerfirm.com

Counsel for Defendant - Appellant

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I. STATEMENT IN SUPPORT OF REHEARING OR REHEARING EN BANC

Pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure and this Circuit, Mr. Houston respectfully petitions for panel rehearing and rehearing *en banc*. The panel (Rogers, Donald and Rose) rendered its decision on February 8, 2016, which is attached hereto and incorporated by reference as Exhibit "A."

The panel overlooked many crucial facts and existing Court precedent in reaching its incorrect decision, thus mandating the need for panel rehearing. See Fed. R. App. P. 40(a)(2).

Furthermore, this case presents questions of exceptional importance concerning the scope of the Fourth Amendment's protection against extended, constant and warrantless technological surveillance of an individual and their property (including its curtilage), that should be reheard by the panel or decided by this Court sitting *en banc*. Fed. R. App. P. 35(a)(2).

Also, the panel's decision conflicts with opinions and Fourth Amendment principles set forth by both the United States Supreme Court (i.e. see *United States v. Dunn*, 480 U.S. 294 (1987); *United States v. Jones*, 132 S. Ct. 945 (2012); *Florida v. Jardines*, 133 S. Ct. 1409 (2013); *Kyllo v. United States*, 533 U.S. 27 (2001)), this Circuit (in *United States v. Anderson-Bagshaw*, 509 Fed.Appx. 396 (6th Cir. 2012)), and other Circuit Courts. Consideration by the full Court is necessary to secure uniformity of prior Court decisions. Fed. R. App. P. 35(a)(1).

II. SUMMARY OF PANEL DECISION

The panel incorrectly determined that there was no violation of Mr. Houston's Fourth Amendment right to be free from an unreasonable search when law enforcement conducted ten weeks of constant, warrantless and surreptitious video surveillance via a camera affixed atop of a public utility pole. The Court concluded that Mr. Houston had no reasonable expectation of privacy (including in the curtilage of the property) because the camera captured (what the panel deemed to be) the same views enjoyed by any passerby on the public road. In addition, the Court declared that the ten-week period of warrantless surveillance was not unconstitutional in length, and that the Fourth Amendment does not punish law enforcement for using technology to more efficiently conduct their investigations.

III. STATEMENT OF THE FACTS

The Roane County Tennessee Sheriff's Department and the Bureau of Alcohol, Tobacco and Firearms investigated Rocky Joe Houston, believing that he was a convicted felon in possession of firearms. (R. 251: Transcript of Proceedings, Jury Trial, Page ID# 1773). The investigation centered on the Houston Farm, located in a rural area of Roane County. While conducting drive-bys of the farm, agents observed Rocky Houston (hereinafter "Mr. Houston") and his brother Clifford Leon Houston (hereinafter "Leon") walking around the property. There was no evidence that these personal observations confirmed that Mr. Houston was in

possession of firearms. (Id., Page ID# 1775). The rear of Leon's trailer could be observed from a nearby road, Dogtown Road, but blue tarps were hung to obstruct its view from the road. (Id., Page ID# 1776).

A pole barn could be seen from Barnard Narrows Road located in the front of the residences. (Id.). The front of the trailer could also be observed, as could the front of the brick house and a side carport. (Id., Page ID# 1777 and 1781). The farmhouse was located on Barnard Narrows Road further down from the driveway to Leon's trailer and the brick house. (Id., Page ID# 1780). It was approximately 50 yards or so from Barnard Narrows Road to the pole barn. (Id., Page ID# 1784).

As the investigation continued without any results, investigators decided to install a pole camera, without a warrant, on October 9, 2012. (Id., Page ID# 1786). Monitoring the farm to specifically focus on Mr. Houston began the next day. (Id., Page ID# 1787). An arrest warrant was issued for Mr. Houston on November 01, 2012. However, the ATF did not obtain a search warrant authorizing the search of the Houston Farm "through the continued use of and recording by a video camera installed on a public telephone pole" until December 19, 2012. (R. 59: Report and Recommendation, Page ID# 450, 452). On January 11, 2013, Rocky was arrested. (R. 251: Transcript of Proceedings, Jury Trial, Page ID# 1812). No firearms were found in his possession. (Id., Page ID# 1813). After Rocky's arrest, additional

search warrants were issued for the trailer of Leon Houston, the brick house, and the farmhouse. (Id., Page ID# 1814).

Over defense objections, video and photographic evidence of recordings from the pole camera were placed before the jury during the trial of the case. Ultimately, Mr. Houston was convicted of being a felon in possession of a firearm.

IV. ARGUMENT

a. THE PANEL OVERLOOKED AND MISUNDERSTOOD CERTAIN VITAL FACTS OF THIS CASE AND THEN MISAPPLIED EXISTING LAW

The panel's holding that no Fourth Amendment violation occurred in this case fails to give the presumption that warrantless searches are per se, unreasonable. *Riley v. California*, 134 S. Ct. 2473, 2494-95 (2014). Moreover, the panel relies mainly on its misunderstanding that "The ATF agents only observed what Houston made public to any person traveling on the roads surrounding the farm." (Opinion, p. 6). The Court further incorrectly reasoned that "while the view of the trailer and his home may have been blocked, it was equally blocked from the view of the camera as from the view of passerby." (Opinion, p. 6). Such a conclusion ignores the evidence of record, thus mandating panel rehearing.

For instance, the panel obviously overlooked or failed to consider the nature of utility poles (that they are erected upward). The District Court recognized that, "(T)he pole camera was... *trained over their roof in the direction of the Houston*

property." (R. 152: Memorandum Opinion an Order, Page ID# 1007). Thus, the record shows that the pole camera was high enough to look over the top of a house. There is absolutely no way that such a perspective can logically be equated to that of the perspective of a passerby on the road. By equating the two, the panel failed to properly consider the evidence before it.

The panel also failed to correctly apply *Katz v. United States*, 389 U.S. 347 (1967), and in doing so, overlooked the steps taken by the Houston brothers to make the curtilage private and express their subjective expectation of privacy in both the curtilage and the farm. For instance, the record shows that the driveway up to the trailer was at times blocked by vehicles to prevent access and views of the farm. (R. 59: Report and Recommendation, Page ID# 460). In addition, the trailer was surrounded by trees and foliage, which acted as a natural barrier to public viewing. (R. 251: Jury Proceeding Tr., Page ID# 1789). To further bolster their privacy, the brothers hung blue tarps around the trailer to block the view of passers-by. (*Id.*, Page ID# 1776 and 1783). Had these facts been properly considered, the panel should have concluded that Mr. Houston had an expectation of privacy and that Fourth Amendment protections should have been given.

Finally, the panel overlooked the factual difference between the ability of a camera and a person. The record shows that the camera was installed approximately 200 yards from the property, (*Id.*, Page ID# 1777), and on top of a

utility pole (which is erected in the air). Also, the camera had rotating, pan and zoom capabilities that the human eye does not possess. (*Id.*, Page ID# 1786). It was also able to do constant, surreptitious surveillance. This is something that the record showed the police were unable to do, for their ability to go unnoticed for such a lengthy period of time is highly unlikely if it were actual agents instead of a camera doing the viewing. As the lead agent, Agent Dobbs, admitted the camera:

> ...was the best option we had at the time because, like I said, if you parked or tried to do surveillance on a constant basis, **there was really no way to do that. You couldn't park there and watch on a constant basis. You would stick out like a sore thumb there.** We did do drive-bys. We drove by on surveillance per say. **You couldn't stop and watch any length of time**. We did drive by and see them out on occasion. As far as really being able to watch and get the information that we needed to potentially get search warrants, it was decided that the pole camera option, which had been successful in a lot of drug investigations, would be our best option. (Id.).

Based on these facts, there is simply no way that the panel should have concluded that a passer-by from the road could have seen the same things as the camera. Thus, rehearing on the issue is mandated.

b. <u>THIS CASE PRESENTS ISSUES OF EXCEPTIONAL CONSTITUTIONAL IMPORTANCE</u>

En banc review is warranted because this case involves questions of exceptional Constitutional importance concerning one's privacy rights, particularly in the ever advancing technology age. Fed. R. App. Pro. 35(b)(1)(B). This case involves the scope of an individual's Fourth Amendment protections against extended, constant, warrantless and surreptitious technological surveillance. As the concurring decision in this case highlights, "The privacy concerns implicated by a

fixed point of surveillance are equal, if not greater, when it is one's home that is under surveillance." (Opinion, p. 18)(Rose, J., concurring).

The import of any Fourth Amendment issue is illustrated by the amount of litigation and appellate cases decided by both this Court and the United States Supreme Court. In addition, issues such as that presently being submitted for *en banc* review, i.e., permissible acts of electronic surveillance, will continue to occur in an era of changing technological advances (cameras, drones, etc.) and the expanding use of technology by law enforcement. Finally, the answers to the questions of this case directly affect the entirety of this nation, as both individual constitutional rights and the rights of law enforcement, are clearly implicated. For these reasons, e*n banc* review is mandated.

c. THE PANEL'S DECISION CONFLICTS WITH FOURTH AMENDMENT PRINCIPLES EXPRESSED BY THE SUPREME COURT, THIS CIRCUIT AND OTHER COURTS

1. The panel's decision concerning Mr. Houston's subjective expectation of privacy contradicts established Fourth Amendment principles

The panel acknowledges that Mr. Houston was recorded "standing near the trailer, an area that at least arguably qualifies as curtilage." (Opinion, p. 6). Nevertheless, the panel inexplicably concluded that he had no reasonable expectation of privacy. This conclusion contradicts longstanding legal principles, as it is undisputed that "the Fourth Amendment protects the curtilage of a house..." *United States v. Dunn*, 480 U.S. 294, 300 (1987), and that curtilage is "part of the

home itself for Fourth Amendment purposes." *Oliver v. United States,* 466 U.S. 170, 176 (1984). Even in *California v. Ciraolo*, 476 U.S. 207 (1986), a case relied upon by the panel, the Supreme Court explained that "privacy expectations are most heightened" in the curtilage area. *California v. Ciraolo*, 476 U.S. 207, 213 (1986). Instead of following this guidance, the panel undermined the protections afforded to Mr. Houston in the curtilage area because, as pointed out above, it incorrectly determined that "the camera captured only views that were plainly visible to any member of the public." (Opinion, p. 6).

The panel decision in this case confronts a similar factual scenario raised in a concurring opinion of the Supreme Court in *Florida v. Jardines*, 133 S. Ct. 1409 (2013). There, the following hypothetical was provided:

> A stranger comes to the front door of your home carrying super-high-powered binoculars...He doesn't knock or say hello. Instead, he stands on the porch and uses the binoculars to peer through your windows, into your home's furthest corners. It doesn't take long (the binoculars are really very fine): In just a couple of minutes, his uncommon behavior allows him to learn details of your life you disclose to no one. *Florida v. Jardines*, 133 S. Ct. 1409, 1418 (2013).

The Court then questioned itself:

> ...has he also invaded your "reasonable expectation of privacy," by nosing into intimacies you sensibly thought protected from disclosure?...Yes, of course, he has done that... *Id.*

Mr. Houston acknowledges that this is dicta and that the camera at issue did not record the interior of his home. Nevertheless, because curtilage is viewed as the same as the home itself, the same invasion of Mr. Houston's reasonable expectation of privacy should have been found to have occurred in this case. This

is particularly true given the fact that it cannot be reasonably concluded that a person expects to be under 24/7 monitoring for a period of ten weeks. Such an intrusion would certainly reveal private information.

This same principle was verified by Justice Sotomayor in her concurring opinion in *United States v. Jones*, 132 S. Ct. 945 (2012). There, she stated that the type of monitoring in that case violated privacy principles because it generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations..." *United States v. Jones*, 132 S. Ct. 945, 955-956 (2012). It is also worth noting that even in *California v. Ciraolo*, 476 U.S. 207, 215 n.3 (1986), the Supreme Court explained that video observation "may become invasive, either due to physical intrusiveness or through modern technology which discloses to the senses those intimate associations, objects or activities otherwise imperceptible to police or fellow citizens." Using these decisions as guidance in this case, Judge Rose's concurring opinion expressed that:

> I find unconvincing the claim that, because this case involves a camera focused on Defendant's house, and not a monitor affixed to a car, the Government cannot gather a wealth of detail about [defendant's] familial, political, professional, religious, and sexual associations. Here, familial relations with Defendant's brother and daughter were studied. Surely, in most cases, ten weeks of video surveillance of one's house could reveal considerable knowledge of one's comings and goings for professional and religious reasons, not to mention possible receptions of others for these and possibly political purposes. Also, by constant surreptitious technological viewing of Defendant's house, the Government knew Defendant occasionally slept in his trailer. (Opinion, p. 18).

Other Circuit Courts have also long recognized that video surveillance like that taken here is intrusive on one's expectation of privacy interests protected by the Fourth Amendment. *See, e.g., United States v. Koyomejian,* 970 F.2d 536, 551 (9th Cir.1992) (Kozinski, J., concurring) ("video surveillance can result in extraordinarily serious intrusions into personal privacy."); *United States v. Taketa,* 923 F.2d 665, 677 (9th Cir.1991) (warrantless video surveillance of an office violated the Fourth Amendment rights of those who were recorded); *United States v. Falls,* 34 F.3d 674, 680 (8th Cir.1994) ("It is clear that silent video surveillance results... in a very serious, some say Orwellian, invasion of privacy."); *United States v. Mesa-Rincon,* 911 F.2d 1433, 1443 (10th Cir.1990) ("Because of the invasive nature of video surveillance, the government's showing of necessity must be very high to justify its use."); *United States v. Nerber*, 222 F.3d 597, 603 (9th Cir. 2000) ("Hidden video surveillance is one of the most intrusive investigative mechanisms available to law enforcement. The sweeping, indiscriminate manner in which video surveillance can intrude upon us, regardless of where we are, dictates that its use be approved only in limited circumstances."); *United States v. Cuevas-Sanchez*, 821 F.2d 248, 251 (5th Cir. 1987) ("This type of surveillance provokes an immediate negative visceral reaction: indiscriminate video surveillance raises the spectre of the Orwellian state."). Such cases counter the panel's seemingly imprudent decision here to undermine Mr. Houston's expectation of privacy.

A District Court decision, *United States v. Vargas*, USDC Eastern District of Washington, Case No. CR-13-6025 (attached hereto and incorporated by reference as Exhibit "B"), is directly on point and contradicts the panel's decision in this case. Though not binding, the decision in that case should act to illustrate and persuade the entirety of this Court that *en banc* review is needed. In *Vargas*, the Government utilized warrantless pole camera surveillance for a period of four to six weeks. In ruling on defendant's Motion to Suppress, the Court determined that people have a reasonable expectation of privacy in the activities occurring in and around the curtilage that prevents and prohibits warrantless, continuous and covert surveillance for an extended period of time. (Order, p. 2).

En banc review is needed to bring consistency to the Court's decisions in upholding individual privacy expectations.

2. The panel's decision that the length of surveillance was constitutional violates standards set forth by prior decisions

The panel further determined that:

> the long length of time of the surveillance does not render the video recordings unconstitutionally unreasonable, because it was possible for law enforcement to have engaged in live surveillance of the farm for ten weeks....the ATF theoretically could have staffed an agent disguised as a construction worker to sit atop the pole or perhaps dressed an agent in camouflage to observe the farm from the ground level for ten weeks. However, the Fourth Amendment does not require law enforcement to go to such lengths when more efficient methods are available. (Opinion, p. 7).

Such a finding merits *en banc* review.

In this case, the video surveillance at issue captured something not actually exposed to public view or able to be viewed by investigating agents—the aggregate of **all** of Mr. Houston's activity on the property over the course of ten weeks. By rationalizing the Government's conduct by equating it to that of a passerby, the panel ignores the fact that the very nature of a passerby is that their observations are limited in time. Extrapolated out to its most outlandish application, the panel's decision allows the warrantless spying on individuals by using a camera trained on any house in America for an unlimited amount of time. Such a finding negates the need for the Fourth Amendment at all.

This type of logic is what prompted the Supreme Court to state that the Fourth Amendment "would be of little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity..." *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013). It also prompted the District Court in *Vargas* to observe that plain view observations are much different from law enforcement's electronic, continuous and remote surveillance that occurred in that (and this) case. (See attached Order, p. 18). Nevertheless, the panel here determined that it was constitutional for law enforcement agents to trawl uninterrupted for ten straight weeks via a surreptitious camera trained on the Houston property. Such a finding is incredulous, and *en banc* review is needed to address this issue.

Also, contrary to the decision of the panel in this case, Justice Alito's concurring opinion in *United States v. Jones,* 132 S. Ct. 945 (2012), illustrated that long term monitoring by the police violates notions of privacy and thereby implements Fourth Amendment protections. He stated that while:

> ...relatively short-term monitoring of a person's movements on public streets accords with expectations of privacy that our society has recognized as reasonable... *the use of longer term...monitoring in investigations of most offenses impinges on expectations of privacy. Jones,* 132 S. Ct. 945, 964 (2012), emphasis added.

This Circuit has also expressed concerns about situations much like this case, particularly concerning the length of the surveillance. It stated that:

> Nonetheless, we confess some misgivings about a rule that would allow the government to conduct long-term video surveillance of a person's backyard without a warrant. Few people, it seems, would expect that the government can constantly film their backyard for over three weeks using a secret camera that can pan and zoom and stream a live image to government agents. *United States v. Anderson-Bagshaw*, 509 Fed. Appx. 396, 405 (6th Cir. 2012).

Despite those misgivings and prior case law, the panel here inexplicably upheld the constitutionality of a ten-week period of constant, warrantless surveillance that could stream live and recorded images to government agents. Such a decision merits e*n banc* review.

3. The panel prioritizes law enforcement over individual rights

The panel declared that:

> if law enforcement were required to engage in live surveillance without the aid of technology in this type of situation, then the advance of technology would one-sidedly give criminals the upper hand. The law cannot be that modern technological advances are off-limits to law enforcement when criminals use them freely. (Opinion, p. 9).

In essence, the Court justifies the constant, warrantless surveillance of the property in this case by submitting to the logic of "If the criminals can do it, so, too, can law enforcement." Such logic is beyond preposterous, and further erodes Constitutional safeguards. In fact, in a society where such logic holds true, in essence, there would no longer be a need for the Fourth Amendment. As the concurring opinion written by Judge Rose explained, the concern must not be expediency of law enforcement, but instead, should be "for the police to work within constitutionally permitted means." (Opinion, p. 19)(Rose, concurring). Instead, as the district court pointed out in *Vargas*, the better approach would be that:

> The police, of course, are entitled to enjoy the substantial advantages this technology confers. They may not, however, rely on it blindly. With the benefits of more efficient law enforcement mechanisms comes the burden of corresponding constitutional responsibilities. (See attached Order, p. 11-12, citing *Arizona v. Evans*, 514 U.S. 1, 17-18 (1995)(O'Connor, J., concurring).

The very nature of Fourth Amendment oversight requires the Court to oversee the conduct of the police. In situations where law enforcement agencies choose to use video surveillance instead of actual agents, the Supreme Court has held that "it evades the ordinary checks that constrain abusive law enforcement practices: limited police resources and community hostility," *United States v. Jones*, 132 S. Ct. 945, 955-956 (2012), and that it "would be to permit police technology to erode the privacy guaranteed by the Fourth Amendment." *Kyllo v. United States,* 533 U.S. 27, 35 (2001). Thus, Supreme Court precedent places the individual's need to be protected from unlawful surveillance above the needs of

law enforcement to use expeditious means of surveillance. The panel's decision here, does the exact opposite, and thus conflicts with precedent on this issue. Rehearing *en banc* should be granted.

V. CONCLUSION

The Petition for Panel Rehearing or Rehearing *En Banc* should be granted.

Respectfully Submitted,
s/ Steven R. Jaeger
STEVEN R. JAEGER
The Jaeger Firm, PLLC
23 Erlanger Road
Erlanger, Kentucky 41018
(859) 342-4500
(859) 342-4501
srjaeger@thejaegerfirm.com

CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2016, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all parties of record.

s/ Steven R. Jaeger
STEVEN R. JAEGER

EXHIBIT

A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: February 08, 2016

Mr. Steven Richard Jaeger
The Jaeger Firm
23 Erlanger Road
Erlanger, KY 41018

Mr. David Charles Jennings
Office of the U.S. Attorney
800 Market Street, Suite 211
Knoxville, TN 37902

Re: Case No. 14-5800, *USA v. Rocky Houston*
Originating Case No. : 3:13-cr-00009-1

Dear Counsel,

The court today announced its decision in the above-styled case.

Enclosed is a copy of the court's opinion together with the judgment which has been entered in conformity with Rule 36, Federal Rules of Appellate Procedure.

Yours very truly,

Deborah S. Hunt, Clerk

Cathryn Lovely
Deputy Clerk

cc: Ms. Debra Poplin

Enclosures

Mandate to issue.

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 16a0031p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ROCKY JOE HOUSTON,

Defendant-Appellant.

No. 14-5800

Appeal from the United States District Court
for the Eastern District of Tennessee at Knoxville.
No. 3:13-cr-00009—Danny C. Reeves, District Judge.

Argued: October 9, 2015

Decided and Filed: February 8, 2016

Before: ROGERS and DONALD, Circuit Judges, and ROSE, District Judge.*

COUNSEL

ARGUED: Steven R. Jaeger, THE JAEGER FIRM PLLC, Erlanger, Kentucky, for Appellant. David C. Jennings, UNITED STATES ATTORNEY'S OFFICE, Knoxville, Tennessee, for Appellee. **ON BRIEF:** Steven R. Jaeger, THE JAEGER FIRM PLLC, Erlanger, Kentucky, for Appellant. David C. Jennings, UNITED STATES ATTORNEY'S OFFICE, Knoxville, Tennessee, for Appellee.

ROGERS, J., delivered the opinion of the court in which DONALD, J., joined, and ROSE, D.J., joined in part. ROSE, D.J. (pp. 18–20), delivered a separate opinion concurring in all but Part II.A. of the majority opinion.

*The Honorable Judge Thomas M. Rose, United States District Judge for the Southern District of Ohio, sitting by designation.

OPINION

ROGERS, Circuit Judge. Rocky Houston appeals his conviction of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). At trial, the primary evidence against Houston was video footage of his possessing firearms at his and his brother's rural Tennessee farm. The footage was recorded over the course of ten weeks by a camera installed on top of a public utility pole approximately 200 yards away. Although this ten-week surveillance was conducted without a warrant, the use of the pole camera did not violate Houston's reasonable expectations of privacy because the camera recorded the same view of the farm as that enjoyed by passersby on public roads. Houston's remaining arguments on appeal—challenges to certain evidentiary decisions, to his classification as a "prohibited person" under § 922(g)(1), and to the reasonableness of his sentence—also lack merit.

I.

In 2012, the Roane County Sheriff's Department informed the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") that Rocky Houston was a convicted felon in open possession of firearms at his residence. Houston had been convicted by a Tennessee jury of a felony in March 2010, although his conviction was still pending on direct appeal when the sheriff's department contacted the ATF and throughout the ATF's subsequent investigation.

Houston and his brother Leon Houston reside on the "Houston family farm," which is comprised of three adjacent properties. Houston resides in a red brick building, Leon in a trailer, and Houston's adult daughter in a farmhouse. Billboards and hand-painted signs critical of government officials and depicting the dead bodies of a law enforcement officer and his civilian ride-along companion (the murders of whom Houston and his brother were tried, but ultimately acquitted) hang approximately twenty yards off the road. While the farm is not enclosed by fencing or other artificial barriers, blue tarps blocked views of the trailer's doors and foliage initially blocked views of Houston's house.

ATF agents first attempted to conduct drive-by surveillance of the farm. However, they were unable to observe for any length of time because their vehicles "[stuck] out like a sore thumb" at the rural property. As a result, on October 9, 2012, at the direction of the ATF and without a warrant, the utility company installed a surveillance camera on a public utility pole located roughly 200 yards from Leon's trailer. The camera broadcasted its recordings via an encrypted signal to an IP address accessed through a log-in and password. The camera could move left and right and had a zoom function. The ATF agents trained the camera primarily on Leon's trailer and a nearby barn because they understood that Houston spent most of his time in and around the trailer and occasionally slept there. At trial, an ATF agent (Special Agent Dobbs) testified that the view that the camera captured was identical to what the agents would have observed if they had driven down the public roads surrounding the farm.

Warrantless monitoring occurred for ten weeks, from October 10, 2012, until December 19, 2012. On December 19, 2012, this court issued *United States v. Anderson-Bagshaw*, 509 F. App'x 396 (6th Cir. 2012), in which we expressed "some misgivings" about the constitutionality of long-term warrantless surveillance of an individual's backyard via a pole camera. *Id.* at 405. In response, the ATF obtained a warrant for the continued use of the pole camera later on the same day that *Anderson-Bagshaw* was issued.

On January 11, 2013, ATF agents arrested Houston when he was away from the farm. No firearms were found on his person. On the same day, agents also executed search warrants for the three residences at the farm. Agents seized twenty-five firearms attributable to Houston and his brother: seventeen from Houston's house, five from Leon's trailer, and three from Leon's person. Houston was originally indicted for fourteen counts of violating § 922(g)(1). However, before trial, the Government moved to dismiss Counts 2–14 as multiplicitous and instead pursued a single count of possession of a firearm on or about January 11, 2013.

Before trial, the district court rejected all of Houston's various motions to suppress and motions in limine. First, the district court denied Houston's motion to suppress video footage obtained from the pole camera. The district court ruled that even if the long-term warrantless surveillance violated Houston's Fourth Amendment rights, the exclusionary rule would not bar admission of the evidence due to the good-faith exception. Additionally, regarding Houston's

argument that the video footage that was recorded after the agents obtained a warrant should be suppressed due to lack of probable cause supporting the warrant, the district court ruled that the warrant was supported by probable cause based on the previous warrantless footage as well as the statements from four individuals that Houston openly possessed firearms at his farm.

At trial, footage from the warrantless use of the camera was introduced to show Houston possessing firearms on seven dates during the ten-week surveillance. A post-warrant video of Houston with a firearm was also admitted. While some of the videos show Houston standing in fields or near barns with firearms, others capture him standing near the trailer with firearms.

Second, the district court denied Houston's motion to prohibit the Government from introducing video or photographic evidence purporting to show Houston possessing firearms absent a foundation that the firearm in the image is one of those confiscated on January 11, 2013. The district court reasoned that because Houston was charged with only one count of continuous possession of a firearm, video and photographic evidence of Houston possessing firearms in the weeks before his arrest would be relevant, highly probative, and not unduly prejudicial to proving that one count.

Third, the district court denied Houston's pretrial motion to prohibit the Government from introducing lay opinion testimony of Special Agent Dobbs regarding the footage. At trial, Houston also requested permission to *voir dire* Dobbs outside the presence of the jury, but the district court denied his request. During his testimony, Dobbs identified for the jury when the recordings showed Houston, his brother, or firearms. Dobbs had become familiar with the brothers through conducting drive-bys and personally observing the brothers, as well as through studying the surveillance footage. Dobbs was also permitted to testify that one of the firearms in the video was a "Ruger Mini 14" because he gained personal familiarity with that type of firearm when a relative owned one.

Fourth, the district court denied Houston's motion to dismiss the indictment. Houston argued that he was not a "prohibited person" under § 922(g)(1), because the appeal of his state felony conviction was still pending when the possessions of firearms alleged in the indictment occurred. Relying on *State v. Vasser*, 870 S.W.2d 543 (Tenn. Crim. App. 1993), the Tennessee

Rules of Evidence, the Tennessee Rules of Criminal Appellate Procedure, this court's precedent, and the legislative intent of § 922(g)(1), the district court ruled that Houston was indeed a "prohibited person" at the time of his alleged possessions of firearms, notwithstanding the pendency of the direct appeal of his predicate felony conviction.

A jury convicted Houston on March 19, 2014. At Houston's sentencing, the district court's Presentence Investigation Report set the base level offense at twenty-two due to the presence of an IMEZ Saiga, 7.62 caliber rifle; the Report then assigned six additional levels for the twenty-five firearms deemed to be in Houston's possession. Houston also had a criminal history category of II. Accordingly, the Guidelines imprisonment range was 87–108 months. The district court sentenced Houston to 108 months of imprisonment.

At the sentencing hearing, Houston objected to the six-level enhancement because he argued that he could not have had constructive possession over the three firearms found on his brother's person when the agents searched the residences on January 11, 2013. The district court rejected this argument because it found that Houston had "unfettered access" to the location where the firearms were kept.

Throughout the sentencing hearing (during which Houston chose to represent himself), Houston told the district court that he had contacted both Presidents Bush and Obama about his case and that he had filed a federal civil rights action against public officials in Roane County, Tennessee. The district court responded by asking Houston questions such as "How did it go for you when you wrote to President Obama? . . . Let me guess. He didn't respond to you?" Additionally, in determining the sentence, the district court took into account the billboards and signs posted at the farm as evidence of Houston's hatred for public officials and his "fortress mentality."

II.

A. No Fourth Amendment Violation

There is no Fourth Amendment violation, because Houston had no reasonable expectation of privacy in video footage recorded by a camera that was located on top of a public

utility pole and that captured the same views enjoyed by passersby on public roads. The ATF agents only observed what Houston made public to any person traveling on the roads surrounding the farm. Additionally, the length of the surveillance did not render the use of the pole camera unconstitutional, because the Fourth Amendment does not punish law enforcement for using technology to more efficiently conduct their investigations. While the ATF agents could have stationed agents round-the-clock to observe Houston's farm in person, the fact that they instead used a camera to conduct the surveillance does not make the surveillance unconstitutional.

This conclusion is supported by *California v. Ciraolo*, 476 U.S. 207 (1986), in which the Supreme Court upheld warrantless aerial observations of curtilage, explaining that the Fourth Amendment does not "preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible." *Id.* at 213. While several of the videos show Houston standing in open fields, an area in which the recordings certainly do not violate his reasonable expectations of privacy, *United States v. Dunn*, 480 U.S. 294, 300–03 (1987); *Anderson-Bagshaw*, 509 F. App'x 396, 403–04 (6th Cir. 2012), other videos show Houston standing near the trailer, an area that at least arguably qualifies as curtilage. Nonetheless, even assuming that the area near the trailer is curtilage, the warrantless videos do not violate Houston's reasonable expectations of privacy, because the ATF agents had a right to access the public utility pole and the camera captured only views that were plainly visible to any member of the public who drove down the roads bordering the farm. *See United States v. Jackson*, 213 F.3d 1269, 1280-81 (10th Cir.), *vacated on other grounds*, 531 U.S. 1033 (2000). Thus, Houston's Fourth Amendment rights were not violated, because he has no reasonable expectation of privacy in what he "knowingly exposes to the public." *Katz v. United States*, 389 U.S. 347, 351 (1967).

Houston argues that the immediate area around the trailer and Houston's home were not readily visible to passersby, because blue tarps blocked the trailer doors and foliage obstructed Houston's home. However, while the view of the trailer and his home may have been blocked, it was equally blocked from the view of the camera as from the view of passersby. There is no evidence that the camera was able to see through the tarps or into the interior of the trailer. The

Supreme Court in *Ciraolo* stated clearly that "the mere fact that an individual has taken measures to restrict some views of his activities" does not "preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible." 476 U.S. at 213.

Without citing the record, Houston alleges in his opening brief that it is "questionable" whether the view from atop the utility pole was the same as the view from the ground, and then later in his reply brief Houston alleges that the areas recorded by the camera definitely could not have been viewed by law enforcement officers standing on public ground. However, even if the view from a telephone pole somehow must be the same as the view from a public road, Special Agent Dobbs testified during the trial that the views from the camera and from the public roads were, in fact, the same, and there does not appear to be any evidence in the record to the contrary. The district court's factual finding in its order denying Houston's suppression motion that the camera recorded the same view enjoyed by an individual standing on public roads was thus not clearly erroneous.

Furthermore, the long length of time of the surveillance does not render the video recordings unconstitutionally unreasonable, because it was possible for law enforcement to have engaged in live surveillance of the farm for ten weeks. Although vehicles "[stuck] out like a sore thumb" at the property, the ATF theoretically could have staffed an agent disguised as a construction worker to sit atop the pole or perhaps dressed an agent in camouflage to observe the farm from the ground level for ten weeks. However, the Fourth Amendment does not require law enforcement to go to such lengths when more efficient methods are available. As the Supreme Court in *United States v. Knotts* explained, law enforcement may use technology to "augment[] the sensory faculties bestowed upon them at birth" without violating the Fourth Amendment. 460 U.S. 276, 282 (1983). The law does not keep the ATF agents from more efficiently conducting surveillance of Houston's farm with the technological aid of a camera rather than expending many more resources to staff agents round-the-clock to conduct in-person observations. *See id.* at 282–84. Nor does the law require police observers in open places to identify themselves as police; police may view what the public may reasonably be expected to view.

Moreover, even if it were not practical for the ATF to conduct in-person surveillance for the full ten weeks, it is only the possibility that a member of the public may observe activity from a public vantage point—not the actual practicability of law enforcement's doing so without technology—that is relevant for Fourth Amendment purposes. Our cases have so held. *See United States v. Skinner*, 690 F.3d 772, 779 (6th Cir. 2012); *United States v. Forest*, 355 F.3d 942, 951 (6th Cir. 2004), *vacated on other grounds*, *Garner v. United States*, 543 U.S. 1100 (2005). In *Forest*, DEA agents lost visual contact of the defendant as he drove on public highways. 355 F.3d at 951. To reestablish the defendant's location, the agents called the defendant's cell phone and hung up before it rang in order to "ping" the defendant's physical location. *Id.* Although the agents could not maintain visual contact, we held that the access of the defendant's cell phone data was not a search under the Fourth Amendment, because it was possible for any member of the public to view the defendant's car. *Id.* Similarly, in *Skinner*, we upheld the warrantless use of cell phone pinging to track the defendant's location on public roads even though law enforcement never made visual contact with the defendant and did not know his identity, because the defendant's movements "could have been observed by any member of the public." 690 F.3d at 779. Here, as in *Forest* and *Skinner*, the length of the use of the camera is not problematic even if the ATF could not have conducted in-person surveillance for the full ten weeks, because any member of the public driving on the roads bordering Houston's farm during the ten weeks could have observed the same views captured by the camera.

In arguing that the length of the surveillance period rendered the use of the pole camera unconstitutional, Houston relies on *Anderson-Bagshaw*, an unpublished opinion, in which we did not rule on the issue but expressed "some misgivings" about permitting warrantless pole camera surveillance of an individual's backyard for over three weeks. 509 F. App'x at 405; *see also* 509 F. App'x at 420–24 (Moore, J., concurring). Houston also cites *United States v. Jones*, in which five Justices appeared willing to rule that warrantless long-term GPS monitoring of an automobile violates an individual's reasonable expectation of privacy. 132 S. Ct. 945, 964 (Alito, J., concurring); *id.* at 955–56 (Sotomayor, J., concurring). However, unlike Justice Alito's concern in *Jones* that long-term GPS monitoring would "secretly monitor and catalogue every single movement" that the defendant made, *id.* at 964 (Alito, J., concurring), the surveillance here was not so comprehensive as to monitor Houston's every move; instead, the

camera was stationary and only recorded his activities outdoors on the farm. Because the camera did not track Houston's movements away from the farm, the camera did not do what Justice Sotomayor expressed concern about with respect to GPS tracking: "generate[] a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations." *Id.* at 955 (Sotomayor, J., concurring). Indeed, we recognized as much in *Anderson-Bagshaw*, the case upon which Houston relies, when we stated that "it may be that the privacy concerns implicated by a fixed point of surveillance are not so great as those implicated by GPS tracking." 509 F. App'x at 405. Thus, notwithstanding the concurrences in *Jones* and dicta in our unpublished opinion, the results in *Knotts*, *Forest*, and *Skinner* indicate that long-term warrantless surveillance via a stationary pole camera does not violate a defendant's Fourth Amendment rights when it was possible for any member of the public to have observed the defendant's activities during the surveillance period.

Moreover, if law enforcement were required to engage in live surveillance without the aid of technology in this type of situation, then the advance of technology would one-sidedly give criminals the upper hand. The law cannot be that modern technological advances are off-limits to law enforcement when criminals may use them freely. Instead, "[i]nsofar as respondent's complaint appears to be simply that scientific devices . . . enabled the police to be more effective in detecting crime, it simply has no constitutional foundation." *Knotts*, 460 U.S. at 284.

Finally, given our holding that the agents did not need to obtain a warrant to conduct the video surveillance in the first place, Houston's argument that the post-warrant video evidence should be suppressed due to a lack of probable cause supporting the warrant is unavailing. All of the pole camera recordings, both those obtained with and without a warrant, were properly admitted during Houston's trial.

B. Video and Photographic Evidence of Firearms not Proven to Be Seized on January 11, 2013

The district court also did not abuse its discretion in admitting video and photographic evidence obtained from the pole camera even though it could not be proved that the firearms in the images were the same firearms seized on January 11, 2013, because the evidence was

relevant and not unduly prejudicial in proving Houston's continuous and uninterrupted possession of firearms. Houston argues that absent a foundation that the firearm in the image is one of those confiscated on January 11, 2013, the introduction of videos or photographs would be irrelevant and would violate Federal Rules of Evidence 404(b) and 403.

Because Counts 2–14 were dismissed as multiplicitous, the district court correctly ruled that evidence of Houston's possessing firearms in the weeks leading up to his arrest was highly probative in proving the remaining count of continuous and uninterrupted possession. The district court also did not abuse its discretion in admitting the evidence because the indictment charges Houston with possession of one or more firearms "on or about" January 11, 2013. "On or about" indicates that time is not an essential element of the offense, so long as the unlawful conduct occurred "reasonably near" the date on the indictment. *United States v. Ford*, 872 F.2d 1231, 1236 (6th Cir. 1989). Therefore, the Government did not have to prove that Houston actually possessed firearms on January 11, 2013. *Id.* While an incident that occurred eleven months before the date on the indictment is not "reasonably near," *id.*, this court has upheld admitting evidence of events that took place thirty-three days and two weeks before the date on the indictment. *United States v. Hettinger*, 242 F. App'x 287, 295 (6th Cir. 2007); *United States v. Manning*, 142 F.3d 336, 338–40 (6th Cir. 1998). The images of Houston consistently possessing firearms on dates between ten and three-and-a-half weeks before the date on the indictment are more similar to the cases in *Hettinger* and *Manning* than the eleven-month gap in *Ford*. Accordingly, the images are relevant to proving the one count of continuous and uninterrupted possession "on or about" January 11, 2013.

In addition, the introduction of video and photographic evidence of firearms that were not proven to be seized on January 11, 2013, was not unfairly prejudicial. Evidence is unfairly prejudicial when it "tends to suggest decision on an improper basis," but is not unfairly prejudicial when it only damages the defendant's case due to the legitimate probative force of the evidence. *United States v. Bonds*, 12 F.3d 540, 567 (6th Cir. 1993) (quoting *United States v. Schrock*, 855 F.2d 327, 333 (6th Cir. 1988)). Because the damage that the evidence caused to Houston's case—that the jury would be more likely to find Houston guilty of continuous and uninterrupted possession of a firearm "on or about" January 11, 2013, after viewing images of

his possessing firearms in the weeks leading up to his arrest—results from the legitimate probative force of the evidence, the evidence was not unfairly prejudicial.

Furthermore, as the district court explained, because the images were properly introduced as substantive evidence of Houston's charged violation of § 922(g)(1), they are not propensity evidence and his 404(b) arguments are thus misplaced.

C. Testimony of Special Agent Dobbs

The district court also did not abuse its discretion in permitting Special Agent Dobbs to offer his lay opinions identifying Houston and firearms in the videos, because Dobbs was better able to identify Houston and the firearms in the less-than-perfect quality videos than the jury due to Dobbs' personal familiarity with both Houston and firearms generally. Houston argues that Dobbs should not have been permitted to testify, because Dobbs did not observe the events firsthand. However, Federal Rule of Evidence 701 permits a lay witness to identify a defendant in a photograph when the witness is more likely than the jury to identify the individual. *United States v. Dixon*, 413 F.3d 540, 545 (6th Cir. 2005). As we explained in *Dixon*, factors relevant to admitting lay identification testimony include whether the witness is generally familiar with the defendant's appearance, whether the witness was familiar with the defendant's appearance at the time the photograph was taken or when the defendant was dressed similarly to the individual in the photograph, whether the defendant disguised his appearance at the time of the offense, whether the defendant has since altered his appearance, whether the photograph is of poor quality, and whether the photograph only shows a partial view of the defendant. *Id.* Furthermore, a reviewing court should particularly defer to the decision by the district court to admit (as opposed to exclude) lay identification testimony because someone who is personally familiar with an individual is presumptively better able to identify the individual in a photograph than a juror. *Id.* at 547 (Rogers, J., concurring).

Here, Dobbs became familiar with Houston—including his typical dress and mannerisms—by observing him in person before Dobbs viewed the videos. Additionally, the video would occasionally "jump" and the images could be "grainy" when the zoom function was used. Accordingly, based on the factors given in *Dixon* and the great level of deference afforded

to the district court's evidentiary decisions, the district court did not abuse its discretion. Similarly, the district court did not abuse its discretion when it permitted Dobbs to identify firearms in the video based on his general familiarity with firearms and the Ruger Mini 14 in particular. Just as Dobbs was more likely to be able to identify Houston in the poor quality videos due to his familiarity with Houston, Dobbs' general familiarity with firearms and the Ruger Mini 14 (which likely exceeded that of the average juror) also made him more likely to be able to identify firearms in the video.

Houston also argues that the district court abused its discretion by refusing to allow Houston's counsel to *voir dire* Dobbs outside the presence of the jury. However, any error in refusing *voir dire* was harmless because Dobbs properly testified as a lay witness.

D. "Prohibited Person" Under 18 U.S.C § 922(g)(1)

Houston's non-evidentiary challenge to his conviction is also without merit. Even though Houston's state felony conviction was pending on direct appeal at the time of his alleged possessions of firearms, Houston was nonetheless a prohibited person under § 922(g)(1). Houston was "convicted" under both possible definitions of "conviction" in Tennessee law and no Tennessee case or statute provides that a person's status as "convicted" is affected by the pendency of a direct appeal for purposes analogous to the loss of the right to possess firearms under § 922(g)(1).

Section 922 (g)(1) states that:

> It shall be unlawful for any person . . . *who has been convicted* in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to . . . possess . . . any firearm or ammunition . . . .

(emphasis added). 18 U.S.C. § 921(a)(20) further provides that "[w]hat constitutes a conviction [for purposes of § 922(g)(1)] shall be determined in accordance with the law of the jurisdiction in which the proceedings were held." Because Houston's underlying felony was adjudicated in Tennessee, Tennessee law governs the definition of "convicted." The Tennessee Code does not define "conviction"; accordingly, Tennessee case law determines the definition.

Under Tennessee law, the meaning of "conviction" depends on the context in which it is used. *State v. Vasser*, 870 S.W.2d 543, 546 (Tenn. Crim. App. 1993). Two meanings of "conviction" exist under Tennessee law. *Rodriguez v. State*, 437 S.W.3d 450, 453 (Tenn. 2014) (citing *Vasser*, 870 S.W.2d at 545). First, the "general" meaning of conviction refers only to "the establishment of guilt by a guilty plea or verdict" and is "independent of sentence and judgment." *Id.* (citing *Vasser*, 870 S.W.2d at 546). Tennessee courts have determined that the "general" meaning of conviction applies when the statutory language denotes a stage of the trial process or is used "in connection with the successive steps in a criminal case." *Vasser*, 870 S.W.2d at 546. Second, the "technical" meaning of conviction requires both a guilty verdict and the adjudication of a sentence by the court. *Id.* Under the Tennessee Rules of Criminal Procedure, the "technical meaning" of conviction is referred to as a "judgment of conviction." *Id.* at 545 (citing Tenn. R. Crim. P. 32(e)). Absent a statutory definition to the contrary, the "technical meaning" is typically used when referring to future consequences that result from conviction, such as civil disabilities. *Id.* at 546 (citing *Vasquez v. Courtney*, 537 P.2d 536, 537-38 (Or. 1975)). Regardless of whether the "general" or "technical" meaning of conviction applies to § 922(g)(1), Houston was "convicted" of a felony under either meaning because a jury issued a guilty verdict and the state court formally sentenced him to one year of imprisonment for the felony. *State v. Houston*, No. E2011-01855-CCA-R3-CD, 2013 WL 500231, at *1 (Tenn. Crim. App. Feb. 11, 2013).

No Tennessee court has held that a person is not considered "convicted" under the law simply because an appeal has been filed, regardless of whether the person's conviction was in the "general" or the "technical" sense. The only case that has considered whether an individual is considered "convicted" during the pendency of an appeal held that the individual did remain "convicted" throughout the duration of the appeal. *State ex rel. Barnes v. Garrett*, 188 S.W. 58, 60 (Tenn. 1916). In *Garrett*, the Tennessee Supreme Court held that a pardon granted while a conviction is on direct appeal is valid under the governor's power in the Tennessee Constitution to grant pardons "after conviction." *Id.* The attorney general argued that the pardon was not issued "after conviction," and therefore was invalid, because the appeal suspended the judgment. *Id.* at 59. After determining that the word "conviction" in the Tennessee Constitution was used in its "general" sense—meaning that the individual's conviction was unaffected by the

imposition or suspension of a sentence—the court ruled that although the appeal suspended the judgment, while on appeal "the defendant stands convicted, unless this court finds error and awards a new trial." *Id.* at 60.

Treating Houston as a prohibited person is also consistent with federal precedent regarding § 922(g)(1). In *Lewis v. United States*, 445 U.S. 55 (1980), the Supreme Court held that the use of an allegedly invalid state felony conviction as the predicate offense under a similar statute did not violate the Due Process Clause of the Fifth Amendment. *Id.* at 64–66. Similarly, we have held that § 922(g)(1) only focuses on the status of the defendant at the time of the possession of the firearm. *United States v. Morgan*, 216 F.3d 557, 565–66 (6th Cir. 2000). We have further recognized that Congress, by enacting § 922, intended to create a class of "presumptively dangerous" individuals that is not limited to only those validly convicted. *Id.* at 566. For example, in *United States v. Olender*, 338 F.3d 629 (6th Cir. 2003), we upheld a defendant's conviction for violating § 922(g)(1) even though the state court realized it had erroneously entered the defendant's predicate convictions as felonies and later entered a corrected judgment changing the convictions to misdemeanors. *Id.* at 631–32. Thus, even if the Tennessee Court of Criminal Appeals had ultimately reversed Houston's conviction, our reasoning in *Morgan* and *Olender* indicates that Congress nonetheless intended for Houston's possessions of firearms during the pendency of his appeal to be prohibited by § 922(g)(1).

Houston argues that his conviction is not "final" under Tennessee law and therefore cannot serve as a predicate felony for § 922(g)(1). However, Houston's arguments that his conviction is not "final" are unfounded because the Tennessee Rules of Appellate Procedure provide that a criminal defendant may only appeal once the trial court enters a "final" judgment of conviction, *State v. Comer*, 278 S.W.3d 758, 760–61 (Tenn. Crim. App. 2008); the very fact that Houston was able to appeal demonstrates that his conviction was "final" under Tennessee law. Likewise, the Tennessee Rules of Evidence further indicate that a conviction is "final" notwithstanding the pendency of an appeal because an individual can be impeached with evidence of a conviction even if an appeal is pending. Tenn. R. Evid. 609(e).

Houston claims that under *Wilkerson v. Leath*, No. 3-93-06, 2012 WL 2361972 (Tenn. Ct. App. Mar. 6, 2012), a conviction is not "final" under Tennessee law until all appeals are

exhausted. However, *Leath* only dealt with the use of a criminal conviction for the purposes of collateral estoppel (or "issue preclusion") in a civil case. 2012 WL 2361972, at *6. The case did not make any attempt to define "conviction." Instead, the *Leath* court limited its inquiry to "the issue of whether the judgment, while pending on appeal . . . was final for collateral estoppel purposes." *Id.* It is understandable why, as a policy matter, Tennessee would choose to require all appeals to be exhausted before a judgment may be used for collateral estoppel; such a rule avoids inconsistent results when the later reversal of a judgment affects the outcome of the case in which the judgment was used as collateral estoppel. Restatement (Second) of Judgments § 13 cmt. f (1982). However, § 922(g)(1) does not share the same policy rationale. As explained above, Congress did not limit the class of prohibited persons under § 922(g)(1) to those validly convicted, *Morgan*, 216 F.3d at 566; thus, § 922(g)(1) does not share the concern that prohibiting a person from possessing firearms could lead to "inconsistencies" when that person's underlying felony conviction is later reversed.

Houston's remaining arguments that his conviction is not "final" are also without merit. He relies on *State v. Scarborough*, 181 S.W.3d 650 (Tenn. 2005), which holds that the Tennessee Constitution does not permit the prosecution to use collateral estoppel against the defendant in order to establish an essential element of the offense. *Id.* at 652. *Scarborough* determined only the extent of a defendant's rights to a jury trial under the Tennessee Constitution, and nothing in the opinion attempts to define "conviction." *Id.* at 658. Houston also argues that we should defer to a Tennessee state judge's statement that Houston's felony judgment was "not a final order." However, the statement is from an order denying Houston post-conviction relief because his application to the Tennessee Supreme Court to review his conviction was still pending, and the statement thus indicates only that Houston may not pursue post-conviction relief under Tennessee law before exhausting all direct appeals. Finally, Houston relies on *United States v. Pugh*, 142 F.3d 438, 1998 WL 165143 (6th Cir. 1998), in which we held in an unpublished opinion that the word "final" in a statutory sentencing enhancement provision should be interpreted as "meaning when direct appeals have been exhausted." *Id.* at *6. The rationale behind this interpretation is to avoid the need to resentence the defendant should one of the underlying prior offenses be reversed on appeal. *See United States v. Morales*, 854 F.2d 65, 69

(5th Cir. 1988). Section 922(g)(1) does not share this efficiency rationale; indeed, as explained in *Morgan*, Congress intended quite the opposite. *See* 216 F.3d at 566.

E. Reasonableness of Houston's Sentencing

Finally, the district court did not abuse its discretion in sentencing Houston, because it acted procedurally and substantively reasonably and without bias in attributing all twenty-five firearms to Houston and in weighing relevant sentencing factors. First, the imposition of the six-level enhancement was procedurally reasonable because the district court could reasonably conclude that Houston had constructive possession of all twenty-five firearms. Constructive possession occurs when a person has the power and intention to exercise dominion and control over an object. *United States v. Bailey*, 553 F.3d 940, 944 (6th Cir. 2009). The possession may be joint, but the Government must prove a nexus between the defendant and the object. *Id.* at 945; *United States v. Craven*, 478 F.2d 1329, 1333 (6th Cir. 1973). In this case, the district court could conclude that Houston had constructive possession of all the firearms because it pointed to specific aspects of the record that illustrate that Houston shared all twenty-five firearms with Leon and had "unfettered access" to the location where the firearms were kept. In particular, the district court relied on the videos showing Houston and Leon using firearms together, the fact that Houston came and went freely from the trailer, and the fact that Houston's son claimed ownership for one of the firearms recovered from Leon's person.

Houston argues that he could not have had constructive possession of the three firearms recovered from Leon's person, because the Government failed to show through "credible evidence" that Houston previously had a nexus with or access to the three firearms seized from Leon's person. However, Houston does not point to anything in the record that rebuts the district court's findings that the brothers shared all of the weapons or that Houston had unfettered access to all of the weapons. Although Leon was carrying the three firearms at the exact moment the agents arrived, his temporary actual possession does not negate the conclusion that Houston also had constructive possession of the firearms.

Second, the record does not indicate that the district court was personally biased against Houston. Houston argues that the district court's asking of questions such as "How did it go for

you when you wrote to President Obama?" illustrates an unlawful bias. However, the questioning merely appears designed to demonstrate to Houston the frivolity of some of his actions and does not rise to the level of bias that would render the sentencing judgment invalid. Such questioning is a far cry from the judge's actions in *Knapp v. Kinsey*, 232 F.2d 458 (6th Cir. 1956), a case cited by Houston, in which the trial judge "took an active part in assisting the plaintiffs in presenting their case and in proving their contentions." *Id.* at 464.

Third, the sentence was within the Guidelines range and therefore is presumptively reasonable. *United States v. Vonner*, 516 F.3d 382, 389–90 (6th Cir. 2008) (en banc). In arguing that his sentence was nonetheless unreasonable, Houston alleges that the district court placed undue weight on the billboards and signs posted at the farm. The district court considered the billboards during sentencing and expressed concern that the billboards demonstrated hatred towards public officials and a "fortress mentality." However, there is no indication that the weight afforded by the district court was unreasonable or undue. As we have previously explained, "[t]hat the court did not weigh the factors raised by Defendant in the manner that he would have liked to have had them weighed does not indicate that the court acted improperly or disregarded Defendant's arguments." *United States v. Hogan*, 458 F. App'x 498, 504 (6th Cir. 2012).

III.

The judgment of the district court is affirmed.

CONCURRENCE

ROSE, District Judge. I concur in the result of the majority opinion affirming Defendant's conviction and sentence for possessing firearms in violation of 18 U.S.C. § 922(g)(1) on January 11, 2013. While I concur in full with sections I, III, and parts B, C, D, and E of section II, I am not convinced of the reasoning behind part II A.

The lead opinion posits that "the ATF . . . could have staffed an agent disguised as a construction worker to sit atop the pole or perhaps dressed as an agent in camouflage to observe the farm from ground level for ten weeks." While *United States v. Skinner*, 690 F.3d 772, 780 (6th Cir. 2012), implies that the actual practicability of law enforcement observing activity from a public vantage point may not be relevant, this Court has also sifted from the panoply of opinions in *United States v. Jones* the concern that long-term non-human surreptitious surveillance "is worrisome because 'it evades the ordinary checks that constrain abusive law enforcement practices: "limited police resources and community hostility."'" *United States v. Anderson-Bagshaw*, 509 F. App'x 396, 422 (6th Cir. 2012)(quoting *United States v. Jones*, 565 U.S. ——, 132 S. Ct. 945, 956, 181 L.Ed.2d 911 (2012) (Sotomayor, J., concurring) (quoting *Illinois v. Lidster*, 540 U.S. 419, 426, 124 S. Ct. 885, 157 L.Ed.2d 843 (2004))).

Also, I find unconvincing the claim that, because this case involves a camera focused on Defendant's house, and not a monitor affixed to a car, the Government cannot gather "a wealth of detail about [defendant's] familial, political, professional, religious, and sexual associations" 132 S. Ct. at 955. Here, familial relations with Defendant's brother and daughter were studied. Surely, in most cases, ten weeks of video surveillance of one's house could reveal considerable knowledge of one's comings and goings for professional and religious reasons, not to mention possible receptions of others for these and possibly political purposes. Also, by constant surreptitious technological viewing of Defendant's house, the Government knew Defendant "occasionally slept" in his trailer. The privacy concerns implicated by a fixed point of surveillance are equal, if not greater, when it is one's home that is under surveillance.

Finally, I do not have the same concern that "if law enforcement were required to engage in live surveillance without the aid of technology in this type of situation, then the advance of technology would one-sidedly give criminals the upper hand." Expediency in this particular situation is not our concern. It is for the police to work within constitutionally permitted means. Fortunately, no one proposes that law enforcement should "be powerless to thwart such behavior." Law enforcement would have the power to obtain a search warrant, returning to them the upper hand.

In this case, it is the search warrant eventually obtained by law enforcement that carries the day. "[T]he untainted portions of the affidavit were sufficient to motivate the [legal] search and would have been sufficient to convince a neutral magistrate of the existence of probable cause." *United States v. Bowden*, 240 F. App'x 56, 61-62 (6th Cir. 2007)(quoting *United States v. Keszthelyi*, 308 F.3d 557, 575 (6th Cir.2002)).

The affidavit supporting the December 19, 2012 application for a search warrant to monitor the house remotely recounts how Defendant was convicted of felony evading arrest in 2004. 3:13-cr-010, Doc. 17-4, PageID# 312. The application further recounts how, while Defendant and his brother were acquitted of murder for the shooting of a Roane County Sheriff's Deputy and his ride-along companion in 2006, they fired 22 shots from an assault rifle and eight rounds from a handgun in what they portrayed at trial as self-defense. A sister admitted that in January 2012 she purchased ammunition for Leon Houston. *Id.* PageID# 313. A confidential informant testified that the two brothers used identical weaponry, to allow sharing ammunition. *Id.* PageID# 314. Another sister reported in December 2011 that there were numerous firearms on the property, including an assault rifle, other long guns and handguns. *Id.* PageID# 312. Finally, a home health care nurse, tending to the Houston's now-deceased father, reported that she observed multiple firearms on the property, including long guns and pistols. *Id.* PageID# 313. The January 11, 2013 application to enter and search the property contained the same allegations. *Id.* Doc. 17-2.[1] The untainted portions of the affidavit were clearly sufficient to

[1]Firearms "are durable goods and might well be expected to remain in a criminal's possession for a long period of time." *United States v. Powell*, 603 F. App'x 475, 478 (6th Cir. (2015)(quoting *United States v. Pritchett*, 40 F. App'x 901, 906 (6th Cir. 2002)).

motivate a legal search and would have been sufficient to convince a neutral magistrate of the existence of probable cause.

Similarly, the admission as evidence at trial from video surveillance taken prior to December 19, 2013 if unconstitutional, was harmless. "To determine whether the error was harmless under *Chapman* [*v. California*, 386 U.S. 18 (1967),] the question [a] court must ask is whether, absent the improperly admitted [evidence], it is clear beyond a reasonable doubt that the jury would have returned a verdict of guilty." *United States v. Wolf*, 879 F.2d 1320, 1324 (6th Cir.1989). Here, the evidence is that of guns, in the trailer of Defendant, a felon. There was video of Defendant on his property in possession of a gun on the day in question obtained pursuant to a warrant. It is clear beyond a reasonable doubt that the jury would have returned a verdict with or without the pre-warrant video.

Whether or not there is a Constitutional right not to have the Government focus a remotely operated surveillance device on one's house for ten-week stretches without a warrant, any error was harmless, because the search warrant application would have been approved absent any potentially prohibited evidence and the other evidence that Defendant possessed a firearm on January 11, 2013 was overwhelming. I concur in the judgment affirming Defendant's conviction and in all other respects of the opinion.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 14-5800

FILED
Feb 08, 2016
DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,
Plaintiff - Appellee,

v.

ROCKY JOE HOUSTON,
Defendant - Appellant.

Before: ROGERS and DONALD, Circuit Judges; ROSE, District Judge.

JUDGMENT

On Appeal from the United States District Court
for the Eastern District of Tennessee at Knoxville.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

EXHIBIT

B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, Plaintiff, v. LEONEL MICHEL VARGAS, Defendant.	No. CR-13-6025-EFS **ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS**

The first duty of government is the safety of its people—by Constitutional means and methods. Technology, including the means for covert surveillance of individuals through the use of a hidden video camera that wirelessly transmits images to an offsite computer of a law enforcement officer, can be an important tool in investigating crime. Here, in April and May 2013, law enforcement officers obtained permission from a utility company to install, and did install, a disguised video camera on a utility pole more than one hundred yards from Defendant Leonel Michel Vargas' rural eastern Washington home. It continuously recorded activity in the front yard of Mr. Vargas' property for more than six weeks and transmitted those images to a law enforcement officer's computer. This permitted the officer, when viewing live footage, to pan and zoom the camera and, when the officer was off duty, to record the footage for later viewing. Mr. Vargas argues this constant surreptitious video viewing and recording of the activities at the front

of his home and yard violated his Fourth Amendment right to be free from unreasonable search. For that reason, he asks the Court to suppress the evidence obtained as a result of this prolonged surreptitious video viewing and recording. The U.S. Attorney's Office (USAO) opposes suppression, contending that the video feed simply permitted law enforcement to remotely observe what any law enforcement officer could have observed if he passed by Mr. Vargas' front yard on the public gravel access road in front of Mr. Vargas' home. After reviewing relevant Fourth Amendment jurisprudence and applying such to the facts here, the Court rules that the Constitution permits law enforcement officers to remotely and continuously view and record an individual's front yard (and the activities and people thereon) through the use of a hidden video camera concealed off of the individual's property *but only* upon obtaining a search warrant from a judge based on a showing of probable cause to believe criminal activity was occurring. The American people have a reasonable expectation of privacy in the activities occurring in and around the front yard of their homes particularly where the home is located in a very rural, isolated setting. This reasonable expectation of privacy prohibits the warrantless, continuous, and covert recording of Mr. Vargas' front yard for six weeks. Mr. Vargas' motion to suppress the evidence obtained as a result of the video feed is granted. The Court provides a more detailed articulation of the factual circumstances and its ruling below.

A. Facts

Mr. Vargas' home is located on Arousa Road: a gravel road in the rural farmland area of Franklin County in eastern Washington. Arousa

Road borders Mr. Vargas' front yard on the east; continuing eastward beyond Arousa Road is undeveloped land with sagebrush and other native plants. Mr. Vargas' driveway is located on the southern portion of his property, with a gate separating Arousa Road and the driveway. The driveway leads to a mixed gravel and dirt parking area and an open, detached parking structure, which was used to store items and park a car and a four-wheeled all-terrain vehicle (ATV). In addition to the gated driveway, a simple wire cyclone fence and a twenty-foot strip of natural vegetation separates Mr. Vargas' front yard from the gravel Arousa Road. Mr. Vargas' home sits approximately sixty feet west of Arousa Road: immediately to the east of the house is an approximate twenty-foot concrete patio, then approximately ten feet of grass and weeds, followed by twenty-five feet of a mixed dirt and gravel parking area, then twenty feet of undeveloped land with natural vegetation in which the cyclone fence is positioned, and then Arousa Road. The concrete patio was used to store adult and children bicycles, a barbeque, a cooler, a garbage-collection container, and other items. South of the driveway and parking structure is an orchard. The orchard also backs the home on its westerly side. North of Mr. Vargas' home is a partial cyclone fence and undeveloped land with sagebrush and other native plants; near the fence was a metal burn barrel. Given the home's setting and the elevation differences in the adjacent land, there are no structures other than those on Mr. Vargas' property that can be viewed from his front door. Other than the gravel Arousa Road which runs in front of Mr. Vargas' property, there is also a mixed dirt and gravel road, approximately 150 yards to the north of his property, which

is perpendicular to Arousa Road. This is a rural, isolated location with very few vehicles using these roads.[1]

City of Kennewick Detective Aaron Clem, who is assigned to the Tri-Cities Violent Gang Task Force,[2] received information in September 2012 that Mr. Vargas was involved in drug distribution in the Tri-Cities area. In April 2013, desiring to learn who Mr. Vargas was associating with at his home, Detective Clem requested permission from Task Force supervising agents to install a sophisticated video camera in a surreptitious manner so that activities in Mr. Vargas' front yard could be surveilled through electronic, remote means. Permission was granted, and FBI technical agents worked with a local utility company to install a hidden video camera on a telephone pole. The selected telephone pole is on the other side of Arousa Road from Mr. Vargas' home and is approximately 150 yards south of the home. The land on which the telephone pole sits is at the crest of a hill to the south of Mr. Vargas' home; therefore, the telephone pole sits at a higher elevation than Mr.

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[1] The "lay of the land" can be discerned from the pictures offered at the suppression hearing and attached to the briefs, ECF Nos. 49 & 60, as well as the recorded video, ECF Nos. 71, 81, & 87.

[2] The Task Force is comprised of law enforcement officers from the U.S. Marshals Service, the Federal Bureau of Investigation (FBI), the Drug Enforcement Agency, Benton and Franklin Counties Sheriff's Departments, and each of the Tri-Cities (Richland, Kennewick, and Pasco) City Police Departments.

Vargas' home. The video camera was installed near the top of the telephone pole. The video camera began operating April 4, 2013.

The video camera's silent feed was wirelessly transmitted to Detective Clem's computer in his office approximately twenty miles away. From his computer, Detective Clem could rotate and zoom the video camera's view. Detective Clem usually aimed the video camera at Mr. Vargas' front yard; yet, Detective Clem could also remotely pan and zoom the camera so that he could focus on anything in the front yard, including the front door, items in the open parking structure, vehicles (and open trunks and doors), individuals, and surrounding area. The video camera operated twenty-four hours a day and its feed was saved to an external hard drive connected to Detective Clem's computer.[3] Although Agent Clem testified that the recording was continuous for this six-week period, there are segments on the hard-drive recording and the DVD that "jump" in time. The Court is unsure whether these time jumps, which typically range from thirty minutes to two hours, are caused by a recording malfunction or whether law enforcement deleted these segments from the recording.

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[3] The external hard drive is ECF No. 81. Also part of the record is a DVD spanning a two-hour interval on May 6, 2013, from the hard-drive recording, which shows Mr. Vargas and two other men engaging in target practice in the area between Mr. Vargas' home and the fence running parallel to Arousa Road. ECF No. 71.

The video camera did not have night vision, or infrared or heat-sensing capabilities. Once the feed was recorded, the recorded image cannot be enlarged without distortion, but "still photographs" can be taken from the video recording, some of which were used to support the subsequent search warrant application, Supp. Hrg. Gov't Ex. No. 1, which is discussed below. There is no evidence that the video camera was used to record what was occurring inside Mr. Vargas' home; however, the technical abilities of the camera would have made it possible for Detective Clem to zoom inside an open front door or an unobstructed window.

When Detective Clem's work schedule permitted, he remotely watched the "live" video feed on his computer. However, often he needed to watch the recorded video feed given that he did not remain at his office computer twenty-four hours a day, seven days a week during the six-week time period the wireless video feed was provided to his work computer. While reviewing the recorded video feed from May 2, 2013, Detective Clem observed Mr. Vargas walk from his backyard to the driveway area in the front of his house and raise his hands while holding an object consistent with a firearm. Detective Clem believed, based on Mr. Vargas' stance and hand positioning, that Mr. Vargas was engaging in target practice with a pistol.

On May 6, 2013, Detective Clem remotely observed, through the live video-camera feed, Mr. Vargas arrive home and greet two males who were waiting in his front yard. The three men socialized and drank in the front yard under the shade of a large tree. After a while, Mr. Vargas placed what appeared to be a glass beer bottle on top of a wooden fence

post – part of the fence that parallels Arousa Road. The men, including Mr. Vargas, took turns engaging in target practice by using a firearm to shoot at the bottle. Detective Clem used his computer controls to zoom and pan the video camera to focus on the individuals' faces, hands, and conduct during the target practice. Because of the camera's zooming capabilities, Detective Clem observed what appeared to be a silver semi-automatic pistol of unknown caliber. Detective Clem also observed what appeared to be recoil from the pistol and smoke leaving the pistol's barrel. Later Mr. Vargas retrieved a rifle from the direction of his house, and the men continued to take turns engaging in target practice, now with the rifle. The location is so remote that the video recorded one of the men urinating at the side of the front yard near the cyclone fence fifteen feet from Arousa Road, presumably confident that he would not be observed.

The recording for May 6 later jumps from 3:56 p.m. to 4:45 p.m.; as a result, there is no recorded video for approximately forty-five minutes. When the recording resumes at 4:45 p.m., two other vehicles and two other men are present. The men continued socializing but no target practice occurred in the presence of these two recently arrived men. After some time, the two recently arrived men leave in a single vehicle. Because the recording does not contain the segment of time when these two "new" vehicles arrive, it is unknown to the Court as to whom arrived in the other "new" vehicle. However, it appears that the driver of that vehicle went into the house and did not socialize with Mr. Vargas and the others outside. Following the departure of these two new men, target practice resumes by the three men who were initially

present. Later that evening, those three men, including Mr. Vargas, enjoy a bonfire in the nearby burn barrel.

Based on his review of Mr. Vargas' prior contacts with law enforcement, Detective Clem suspected that Mr. Vargas was residing unlawfully in the United States. Detective Clem spoke to U.S. Immigration and Customs Enforcement agents, who also believed that Mr. Vargas was in the United States unlawfully. On May 14, 2013, Detective Clem applied for a search warrant based on Mr. Vargas' suspected violation of 18 U.S.C. § 922(g)(5): being an alien in possession of a firearm. A federal magistrate judge issued a search warrant later that day for evidence of crime and contraband in Mr. Vargas' home and outbuildings. On May 16, 2013, the Task Force executed the search warrant at approximately 6:00 a.m. During the search, four firearms were found, as well as baggies containing 5 grams of a white crystal substance that field tested presumptive positive for methamphetamine.

On the day that Detective Clem applied for the search warrant, he also requested that the FBI technical agents turn off the video camera feed. Detective Clem testified that he was unsure when the video camera was physically removed. Yet, the recording shows on May 16, 2013, at 4:45 a.m. (approximately one hour before the search warrant was executed) that the video camera's lens was shifted (presumably remotely) so that only the sagebrush field to the east of home was in view. At 10:50 a.m., the video camera's lens was shifted back (presumably remotely) so that Mr. Vargas' home and front yard was in its view again. Law enforcement apparently finished executing the search warrant by that time as law enforcement officers are not seen on Mr. Vargas' property

when the video camera's lens shifts back to Mr. Vargas' property. The recording contains footage until approximately 8:00 a.m. on May 17, 2014.

On May 16, 2013, a criminal complaint was filed in this District charging Mr. Vargas with violating 18 U.S.C. § 922(g)(5) (alien in possession of a firearm) and 21 U.S.C. § 841(a)(1) (intent to distribute 5 grams or more of actual meth). ECF No. 1. On May 22, 2013, an Indictment was filed, charging Mr. Vargas with these same crimes. ECF No. 12.

Believing that the evidence obtained as a result of the video camera's surreptitious viewing and recording of the on-goings in his front yard for six weeks violated his Fourth Amendment right to be free from unreasonable search, Mr. Vargas filed a motion to suppress the evidence obtained as a result of the video camera. ECF No. 47. The Court held an evidentiary hearing on the opposed suppression motion on February 11, 2014, ECF No. 72, and permitted the Electronic Frontier Foundation (EFF) to submit amicus curiae arguments, ECF Nos. 55 & 63.[4] Following the hearing, the Court invited supplemental briefing. ECF Nos. 76, 86, 93, & 97. The Court also requested the USAO provide Defendant and the Court with technical details regarding the video

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[4] Mr. Vargas was present at the pretrial conference, represented by John Matheson. Alexander Ekstrom appeared on behalf of the USAO. Hanni Fakhoury and Robert Seines appeared on the EFF's behalf. The Court heard testimony from Detective Aaron Clem.

camera and associated technology (collectively, "video camera"). The USAO expressed concern regarding disclosing details about the video camera, contending that such information is protected by the law-enforcement privilege. As explained below, the Court determines it need not learn further details of the technological capabilities of the video camera, or ascertain whether the law-enforcement privilege protects such information, under these circumstances.

B. Analysis

Law enforcement may collect information to aid its investigations, but law enforcement's conduct is limited by the Fourth Amendment. *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013). The Fourth Amendment protects "[t]he right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. It is a basic principle of Fourth Amendment law that searches and seizures without a warrant are presumptively unreasonable. *See, e.g., Riley v. California*, 134 S. Ct. 2473, 2494-95 (2014); *Groh v. Ramirez*, 540 U.S. 551, 559 (2004). How the Fourth Amendment applies to protect the people's right to be free from unreasonable search and seizure is a matter of continuous public and legal scrutiny, especially with the evolution of new technologies and their use by law enforcement.[5]

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[5] Recent polls indicate that many Americans are concerned with the oversight that presently applies to government surveillance programs. *See* Emily Swanson, *Poll: NSA Oversight is Inadequate, Most Americans Say*, Huffington Post, Aug. 27, 2013, *available at* http://www.huffingtonpost.com/2013/08/17/nsa-oversight-poll_n_3769727.html;

Riley, 134 S. Ct. at 2484 (recognizing that flip phone and smart phones are "based on technology nearly inconceivable just a few decades ago"). "The police, of course, are entitled to enjoy the substantial advantages this technology confers. They may not, however, rely on it blindly. With the benefits of more efficient law enforcement mechanisms comes

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Frank Newport, *Americans Disapprove of Government Surveillance Programs*, GALLUP Politics, June 12, 2013, *available at* http://www.gallup.com/poll/163043/americans-disapprove-government-surveillance-programs.aspx. *See also* Adam Schwartz, *Chicago's Video Surveillance Cameras: A Pervasive and Poorly Regulated Threat to Our Privacy*, 11:2 Nw. J. Tech. & Intell. Prop. 2, 47 (Jan. 2013) (discussing privacy concerns with government use of cameras even in public spaces, and recommending that the government notify the public as to where a camera is located); The Editorial Board, *The President on Mass Surveillance*, N.Y. Times, Jan. 17, 2014, *available at* http://www.nytimes.com/2014/01/18/opinion/the-president-on-mass-surveillance.html?module=Search&mabReward=relbias%3Ar%2C%5B%22RI%3A8%22%2C%22RI%3A13%22%5D ("The president announced important new restrictions on the collection of information about ordinary Americans, including the requirement of court approval before telephone records can be searched. He called for greater oversight of the intelligence community and acknowledged that intrusive forms of technology posed a growing threat to civil liberties."); *Surveillance of Citizens by Government*, N.Y.Times, *available at* http://topics.nytimes.com/top/reference/timestopics/subjects/s/surveillance_of_citizens_by_government/index.html (organizing commentary and archival articles regarding surveillance of citizens by the government).

the burden of corresponding constitutional responsibilities." *Arizona v. Evans*, 514 U.S. 1, 17-18 (1995) (O'Connor, J., concurring).

The Supreme Court's recent decisions in *United States v. Jones*, 132 S. Ct. 945 (2012), and *Florida v. Jardines*, 133 S. Ct. 1409 (2013), discuss and clarify the Fourth Amendment analysis the Court is to employ when analyzing the constitutionality of a search conducted by law enforcement. To determine whether an unreasonable search occurred, a court considers two Fourth-Amendment approaches: 1) whether a trespass by law enforcement occurred (property-based approach), and/or 2) whether an individual's reasonable expectation of privacy was violated by law enforcement (reasonable-expectation-of-privacy approach). *Jones*, 132 S. Ct. at 951 & 953.

The property-based approach does not apply here. Law enforcement did not physically enter Mr. Vargas' land or home until after it obtained a search warrant based on the information learned from the video camera. And law enforcement did not gain access to Mr. Vargas' wireless service or other digital property to covertly record and transmit the activities in the front yard. The video camera did "intrude" upon Mr. Vargas' front yard and the vehicles contained therein by recording the incidents occurring thereon or items contained therein; however, the camera itself was not on Mr. Vargas' land but rather on a telephone pole on another's land, to which law enforcement had obtained permission to install the camera. For these reasons, a physical trespass did not occur. *See Jones*, 132 S. Ct. at 953 ("Situations involving merely the transmission of electronic signals without trespass . . . *remain[s]* subject to" a reasonable-expectation-of-privacy approach.).

The reasonable-expectation-of-privacy approach requires the Court to assess whether 1) Mr. Vargas had an actual (subjective) expectation that the activities in his front yard would be private, and 2) "'society is prepared to recognize [his subjective expectation of privacy] as reasonable.'" *United States v. Lopez-Cruz*, 730 F.3d 803, 807 (9th Cir. 2013) (internal citations removed). Accordingly, the Court's analysis focuses on whether Mr. Vargas had a reasonable expectation of privacy to not have his front yard continuously observed and recorded for six weeks by a camera with zooming and panning capabilities hidden on a telephone pole over a hundred yards away, and whether his subjective expectation of privacy is objectively reasonable. *See id.* The Court finds the answer to both of these questions is clear: society expects that law enforcement's continuous and covert video observation and recording of an individual's front yard must be judicially approved, and Mr. Vargas' conduct during the six weeks that his front yard was covertly observed and recorded indicates that he expected not to have his front yard covertly observed and recorded on a continuous basis by law enforcement.

The parties' and EFF's arguments, concerning the subjective and objective reasonable expectations of privacy, include analysis of whether Mr. Vargas' front yard is part of his home's curtilage or an "open field." Given the invasive nature of the employed continuous video surveillance, the Court rules that the Fourth Amendment analysis here is not controlled by whether Mr. Vargas' front yard is or is not part of his home's curtilage. *See Riley*, 134 S. Ct. at 2490-91 (assessing the pervasiveness of the intrusion on one's privacy when

searching cell phones). Yet to provide a thorough analysis of all issues addressed by the parties, the Court proceeds to analyze curtilage and "open field" principles to the facts of this case.

Typically, an individual has a reasonable expectation of privacy to his curtilage: the area immediately surrounding his home that "harbors the intimate activity associated with the sanctity of a man's home and the privacies of life." *United States v. Dunn*, 480 U.S. 294, 300 (1987); *see also Jardines*, 133 S. Ct. at 1414 ("At the [Fourth] Amendment's 'very core' stands 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961))). Four factors assist with assessing whether an area is within the curtilage: 1) the area's proximity to the home, 2) whether the area is enclosed, 3) the uses for that area, and 4) the steps taken by the resident to protect the area from observation by a passerby. *Dunn*, 480 U.S. at 301. These factors do not complete the curtilage assessment but rather "are useful analytical tools only to the degree that, in any given case, they bear upon the centrally relevant consideration – whether the area in question is so intimately tied to the home itself that it should be" protected by the Fourth Amendment. *Id.*

While a person typically has a reasonable expectation of privacy to his curtilage, an individual has no reasonable expectation of privacy in an "open field," the area outside of a home's curtilage. *Oliver v. United States*, 466 U.S. 170, 179 (1984) ("[A]n individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home [the

curtilage]."). "An open field need be neither 'open' nor a 'field' as those terms are used in common speech. For example . . ., a thickly wooded area nonetheless may be an open field as that term is used in construing the Fourth Amendment." *Id.* at 180, n.11.

After assessing each of the *Dunn* factors, the Court concludes Mr. Vargas' front yard is part of his home's curtilage. First, the front yard is immediately adjacent to the house. Second, the front yard is fenced on the east and includes a gated driveway. Although the front wire cyclone fence, which is supported by wooden and metal posts, does not substantially obstruct a passerby's view, a passerby's view of the front yard is hindered to some degree by the sagebrush, trees, and other native plants, which are in the front yard and which line the fence. Furthermore, there is a slight embankment between Arousa Road and the front yard. The open parking structure provides a southern obstacle, and the house provides a western barrier. As to the third *Dunn* factor, Mr. Vargas and those he lived with used their front yard for "backyard purposes": to barbeque, socialize with guests, and target practice. In addition, the household used the front yard to park cars and the ATV, store adult and children's bikes, and hold the garbage-collection container and a burn barrel. The USAO argues that target practice is not an intimate activity associated with the sanctity of Mr. Vargas' home and the privacies of life. However, the Court must view this activity in the context of the home's setting—a rural locale off a gravel road—and in light that the target practice was an activity engaged in by three men as they relaxed and socialized in the shade of the tree in Mr. Vargas' front yard. The relaxed nature of this

gathering, and the expectation that it was a private activity, is underscored by the fact that one of the men urinated near the cyclone fence, approximately fifteen feet from Arousa Road. The Court finds under these circumstances that the act of engaging in target practice in the front yard is consistent with the Court recognizing the front yard as part of the home's curtilage. As to the last *Dunn* factor (the steps taken by the resident to protect the area from observation by a passerby), Mr. Vargas selected to live in a home in a rural setting off a gravel road with trees, fencing, and a gated driveway.

Accordingly, after considering these four factors, amongst the totality of the circumstances, the Court finds Mr. Vargas' front yard is part of his home's curtilage. *See Jardines*, 133 S. Ct. at 1414-15 (recognizing that the home's front porch was part of the curtilage even though it was not enclosed or gated, and could be seen from the road). Mr. Vargas' front yard was separated from the gravel Arousa Road by a fence and gated driveway; Mr. Vargas also enjoyed a sense of enclosure in his front yard due to the parking structure, northern fence, and the natural vegetation and elevation change near the eastern fence; and Mr. Vargas did not affirmatively draw the public onto his property. *Cf. United States v. Duenas*, 691 F.3d 1070, 1081 (9th Cir. 2012) (finding the non-enclosed front yard was not part of the curtilage as there was no evidence regarding the uses for the non-enclosed front yard); *United States v. Bausby*, 720 F.3d 652, 656 (8th Cir. 2013) (finding a chain-link-fenced front yard was not part of the curtilage because the defendant took affirmative steps to draw the public into his front yard by displaying items for sale); *United States v. Anderson-Bagshaw*, 509

Fed. Appx. 396, 404-05 (6th Cir. 2012) (unpublished opinion) (distinguishing between three areas outside the home, finding the backyard, which was in immediate proximity to the house and was fairly enclosed by trees, a fence, and a barn, and contained a picnic table and clothesline, was part of the curtilage, and finding the pasture and barnyard were outside of the curtilage). Accordingly, the Court finds the front yard is part of the home's curtilage. However, as mentioned above, the Court's finding of curtilage is not essential to the Court's finding that law enforcement's constant video-camera surveillance of Mr. Vargas' front yard for six weeks is an unreasonable search given that Mr. Vargas reasonably expected that his private activities in his front yard would not be subject to such constant, covert surveillance.[6]

The Court so rules while recognizing that law enforcement is not barred from making "plain view" observations of a home's curtilage. "The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares. Nor does the mere fact that an

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[6] Given the reasonable expectation of privacy that Mr. Vargas possessed to his front-yard activities, the question of whether he possesses a privacy interest in his "personal curtilage" need not be addressed. *See* Andrew Ferguson, *Personal Curtilage: Fourth Amendment Security in Public*, 55 Wm. & Mary L. Rev. 1283, 1345-48 (April 2014) (discussing the need for Fourth Amendment jurisprudence to recognize a privacy right to one's personal curtilage, especially given the pervasive use of public surveillance by video cameras).

individual has taken measures to restrict some views of his activities preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible." *California v. Ciraolo*, 476 U.S. 207, 213 (1986).

The permitted "plain view" observations in *Ciraolo*, however, are much different from law enforcement's electronic, continuous remote surveillance here. In *Ciraolo*, the Supreme Court analyzed "whether naked-eye observation of the curtilage[, *i.e.*, a fully-fenced backyard,] by police from an aircraft lawfully operating at an altitude of 1,000 feet violates an expectation of privacy that is reasonable." *Id.* at 213-14. The Supreme Court held no, highlighting that any member of the public flying in the airspace above the defendant's home could have seen the marijuana in the backyard, and therefore defendant's expectation that his garden would not be observed was unreasonable and not an expectation that society is prepared to honor. *Id.*

The same day as *Ciraolo*, the Supreme Court decided *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986). In *Dow Chemical*, the Supreme Court determined "the open areas of an industrial plant complex with numerous plant structures spread over an area of 2,000 acres are not analogous to the 'curtilage' of a dwelling for purposes of aerial surveillance; such an industrial complex is more comparable to an open field and as such it is open to the view and observation of persons in aircraft lawfully in the public airspace immediately above or sufficiently near the area for the reach of cameras." *Id.* at 240.

Yet, the Supreme Court took the opportunity to note in *Dow Chemical*, "this is *not* an area immediately adjacent to a private home,

where privacy expectations are most heightened." *Id.* at 237, n.3. This comment by the Supreme Court in *Dow Chemical* is interesting given its same-day ruling in *Ciraolo*: law enforcement's naked-eye observation of marijuana in one's back yard did not constitute a Fourth Amendment violation. The Supreme Court's comment in *Dow Chemical* indicates that *Ciraolo* may have been decided differently if law enforcement's observations included more than a one-time naked-eye observation of defendant's backyard.

In 2011, the Ninth Circuit commented on plain-view curtilage observations by law enforcement in *United States v. Perea-Rey*, 680 F.3d 1179 (9th Cir. 2011). In *Perea-Rey*, the Ninth Circuit determined a carport within the fenced front yard and adjacent to the house was part of the curtilage and therefore the officers violated the defendant's Fourth Amendment right by entering the curtilage without a warrant. While *Perea-Rey* involved a physical trespass by the officers, the Ninth Circuit commented, "a warrant is not required to observe readily visible items within the curtilage, and 'officers [need not] *shield their eyes* when passing by a home on public thoroughfares." *Id.* at 1186 (emphasis added). The Ninth Circuit highlighted that therefore law enforcement can use what they actually saw from a public vantage point, such as a sidewalk, in a warrant application. *Id.*

Based on this Fourth Amendment jurisprudence, there is no question that, if Agent Clem had personally watched Mr. Vargas possess a firearm in his front yard, when either passing by on Arousa Road, flying above Mr. Vargas' property on a one-time occasion, or sitting on the telephone pole with a camera and telephoto lens, Agent Clem's observation would

not constitute a search, and therefore, he could use such observation as a basis for a search warrant. Although having an agent sit on top of a telephone pole may seem far afield, it is consistent with Justice Scalia's "constable" example in *Jones*, 132 S. Ct. at 950, n.3. In *Jones*, Justice Scalia posits that a constable could conceal himself in a suspect's coach in order to track the movements of the coach, thereby serving as an 18th century global-positioning-system (gps) device.

Here, it may have been possible for law enforcement agents to take turns personally observing Mr. Vargas' activities in his front yard for a thirty-day period but the success of such hypothetical constables going unnoticed by Mr. Vargas for thirty days is highly unlikely. *See Nerber*, 222 F.3d at 604 (recognizing that people modify their behavior when they are in the presence of others). Nevertheless, the Court is limited to the facts before it, which do not include constables sitting on the telephone pole. Rather Agent Clem only had the information pertaining to Mr. Vargas' May 2 and 6, 2013 target practices because of the live and recorded view afforded by the video camera, which was covertly installed approximately thirty days prior to these events. This "view" is so different in its intrusiveness that it does not qualify as a plain-view observation.

"Hidden video surveillance is one of the most intrusive investigative mechanisms available to law enforcement. The sweeping, indiscriminate manner in which video surveillance can intrude upon us, regardless of where we are, dictates that its use be approved only in limited circumstances." *Nerber*, 222 F.3d at 600. Although law enforcement is permitted to use technology to enhance investigative

abilities, *see Ciraolo*, 476 U.S. at 215, law enforcement's video surveillance of Mr. Vargas' front yard for six weeks with a camera that could zoom and record violated his reasonable expectation of privacy: an expectation that society is prepared to recognize as reasonable.[7]

Continuous video surveillance of an individual's front yard "provokes an immediate negative visceral reaction: indiscriminate video surveillance raises the specter of the Orwellian state." *United States v. Cuevas-Sanchez*, 821 F.2d 248, 251 (5th Cir. 1987) (permitting thirty days of video surveillance from a pole camera which recorded defendant's backyard only because law enforcement had obtained a warrant to do so); *see also Nerber*, 222 F.3d at 603-04 (suppressing in part evidence obtained from a video camera installed in a hotel room because, although the defendants did not rent the room, they had a legitimate expectation of privacy when they were in the room by themselves); *United States v. Taketa*, 923 F.2d 665, 673-74 (9th Cir. 1991) (suppressing video footage of federal employees in their offices because it violated the Fourth Amendment as they had a legitimate expectation of privacy not to be continuously recorded by a hidden ceiling camera in their office); *Shafer v. City of Boulder*, 896 F. Supp. 2d 915, 930-32 (D. Nev. 2012) (finding, in the context of a 42 U.S.C. § 1983 lawsuit, that the use of

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[7] *Cf.* Marc Blitz, *The Fourth Amendment Future of Public Surveillance: Remote Recording and Other Searches in Public Places*, 63 Am. U. L. Rev. 21, 84-86 (Oct. 2013) (recommending that Fourth Amendment analysis pertaining to public surveillance focus on whether a recording was generated and reviewed by law enforcement).

a video camera on a neighbor's property to film the plaintiff's backyard for fifty-six days constituted a search as the plaintiff had a reasonable expectation that his home would not be subject to unwarranted government video surveillance). This dragnet law enforcement practice is not akin to either a naked-eye observation or a photographic picture by a live officer.[6] *See United States v. Knotts*, 460 U.S. 276, 284

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[6] The use of drones by law enforcement is another investigative practice that deviates greatly from "traditional" law enforcement investigative practices. Many states have adopted legislation to control the use of drones because a drone's ability to constantly and covertly view and record an individual or setting infringes on the American public's reasonable expectation of privacy that they will not be constantly and covertly observed by the government without a warrant. While seeking to protect this reasonable expectation of privacy, the drone legislation permits law enforcement to seek a judicial warrant to utilize a drone for investigative purposes; or under limited exceptions, which are similar to the warrant exceptions developed under Fourth Amendment case law, the legislation permits law enforcement to use a drone for investigative purposes without a warrant in order to counter a specific terrorist attack or prevent specific imminent danger to life or property. *See* Judge C. Philip Nichols, *Drones: The Coming of Age of a Not-So-New Technology*, 53 ABA: The Judge's Journal 4 (2014) (summarizing thirteen state's enacted drone legislation); Y. Douglas Yang, *Big Brother's Grown Wings: The Domestic Proliferation of Drone Surveillance and the Law's Response*, 23 B.U. Pub. Int. L.J. 343, 365 (Summer 2014) (discussing the different state's legislative response to the use of drones). *See also* George Blum, Romualdo Eclavea, Alan Jacobs, and Eric Surette, 68 Am.

(1982) (noting "if such dragnet type law enforcement practices . . . should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable"). Electronic surveillance by the government is increasing, and the need to balance this government tool with the Fourth Amendment is required. *See Riley*, 134 S. Ct. at 2484-85 (assessing the degree to which the search intrudes on an individual's privacy and the degree to which the search is needed to promote legitimate governmental interests).

Here, the Fourth Amendment permits the type of electronic surveillance employed only if a warrant[9] supported by probable cause is

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Jur. 2d Searches and Seizures § 114 (Nov. 2014) (discussing the case-law exceptions to the Fourth Amendment's warrant requirement).

[9] Not only has technology eased law enforcement's investigative abilities but technology has also expedited law enforcement's ability to obtain a warrant. *See Missouri v. McNeely*, 133 S. Ct. 1552, 1561-62 (2013) (observing that technology now "allow[s] for the more expeditious processing of warrant applications," and citing state statutes permitting warrants to be obtained "remotely through various means, including telephonic or radio communication, electronic communication . . ., and video conferencing")); *see also* Admin. Office of the U.S. Courts, Table S-17: Matters Disposed of by U.S. Magistrate Judges During the 12-Month Periods Ending September 30, 2004, and September 30, 2009 Through 2013, *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2013/tables/S17Sep13.pdf (showing an 83% increase in search warrant applications between 2004 and 2013); Admin. Office of the U.S. Courts, Wiretap Report 2012 (2012), *available at* http://www.uscourts.gov/Statistics/WiretapReports/wiretap-

obtained because society recognizes Mr. Vargas' subjective expectation of privacy in his front yard as a reasonable expectation of privacy.[10] And given the setting, Mr. Vargas reasonably believed that his front-yard activities would be private. Mr. Vargas chose to live in a rural area: an area mixed with farmland and undeveloped, sagebrush land. His rural home sits off a gravel road, and his front yard has a sense of enclosed space given a gated driveway and cyclone fence separating it from the gravel road. The USAO argues that any passerby could have seen Mr. Vargas' conduct. However, the setting of Mr. Vargas' home does not make the likelihood of a passerby likely: the road is gravel, his neighbors are "country neighbors," *i.e.*, they live a distance away, and there are no public sidewalks. In addition, Mr. Vargas could hear a vehicle coming down the gravel road and modify his behavior, *i.e.*, target practice would cease. *See Nerber*, 222 F.3d at 604 ("People feel comfortable saying and doing things alone that they would not say or do

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report-2012.aspx (comparing 3,397 wiretap applications in 2012, with 1,359 wiretap applications in 2002; with approximately 99%of the wiretap applications being granted in those years).

[10] A warrantless video search and recording by law enforcement for a limited period of time based merely on reasonable suspicion may be consistent with *Terry v. Ohio*, 392 U.S. 1 (1968). Yet, here, law enforcement's continued use of the covert video recording clearly exceeded *Terry*: a warrant was required. This also is not a case involving officer safety or the use of a recording device activated by a law enforcement officer during a *specific* encounter at which the officer was present.

in the presence of others."). In fact, the recording shows that Mr. Vargas ceased target practice in the presence of the two new individuals. Even if Mr. Vargas could not expect total privacy in his rural front yard, "this diminished privacy interest does not eliminate society's expectation to be protected from the severe intrusion of having the government monitor private activities through hidden video cameras." *Id.*

The circumstances before the Court are different in kind from the circumstances in the cases cited by the USAO: *United States v. Jackson*, 213 F.3d 1269 (10th Cir. 2000), *vacated on other grounds*, *Jackson v. United States*, 531 U.S. 1033 (2000); and *United States v. Vankesteren*, 553 F.3d 286 (4th Cir. 2009). In *Jackson*, the Tenth Circuit upheld law enforcement's use of video surveillance from a pole camera to record the front of the defendant's home in Elk City, Oklahoma. The defendant's home in *Jackson* was on a public street, and there was no meaningful analysis as to the impact of the *prolonged* nature of the video surveillance. 213 F.3d at 1280-81. In *Vankesteren*, the Fourth Circuit permitted the warrantless use of video surveillance from a pole camera to "view" defendant's bird-trapping conduct on fields which were located more than a mile from his home. 553 F.3d at 287-88 (4th Cir. 2009). And fairly recently, an Arizona District Court found that law enforcement did not conduct a search by obtaining permission of a neighboring business to install a video camera to continuously record the happenings in the adjacent apartment complex's fenced parking lot because a passerby could observe the happenings if he was in either the

parking lot or outside the complex through the iron fence's openings. *United States v. Brooks*, 911 F. Supp. 2d 836, 843 (D. Ariz. 2012).

The facts involved in these three cases are different from those before the Court. Here, the video camera recorded the activities in Mr. Vargas' partially fenced, rural front yard for six weeks: this is not a public or urban setting.[11] *See Oliver*, 466 U.S. at 178 ("[A]n individual may . . . legitimately demand privacy for activities conducted . . . in the area immediately surrounding the home."). Mr. Vargas had a "'constitutionally protected reasonable expectation of privacy'" to not have his front yard continuously recorded by a surreptitiously placed video camera on a distant telephone pole that could zoom to view the activities occurring in his front yard for six

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[11] Video cameras are commonly used by law enforcement in public places. *See also* Opinion, *Terrorism Forces Us to Rethink Use of Surveillance*, The Olympian, May 9, 2013, *available at* http://www.theolympian.com/2013/05/09/2538441/ terrorism-forces-us-to-rethink.html (discussing polling results showing approximately 80 percent of respondents favor surveillance by camera of public places); Jerry Ratcliffe, Center for Problem-Oriented Policing, *Video Surveillance of Public Places* (2006), *available at* http://www.popcenter.org/responses/video_surveillance; Andrea Noble, *Public Surveillance from Private Property Questioned*, The Washington Times, Feb. 5, 2012 (discussing the use of video cameras by a private neighborhood association in order to deter crime by taping public spaces such as streets and sidewalks). Mr. Vargas' front yard is not a public place.

weeks. *Ciraolo*, 476 U.S. at 211 (quoting *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring)). Absent Mr. Vargas' May 2 and 6, 2013 target practice, how long the video camera would have remained operational is unknowable. The reasonableness of the expectation that one would not be observed and recorded in Mr. Vargas' front yard by a covert video camera is underscored by law enforcement's decision to shift the view of the camera during the execution of the search warrant.

Because the invasive and continuous manner in which the video camera was used for six weeks to surreptitiously record Mr. Vargas' front yard clearly violates Mr. Vargas' Fourth Amendment right to be free from unreasonable search, whether the video camera is or is not "in general public use" is immaterial to the Court's Fourth Amendment analysis. *Cf. Kyllo v. United States*, 533 U.S. 27, 34 (2001) (obtaining information regarding conduct inside a home through the use of technology that is not in general public use is a search); *Dow Chem. Co. v. United States*, 476 U.S. 227, 238 (1986) (recognizing that "surveillance of private property by using highly sophisticated surveillance equipment not generally available to the public, such as satellite technology, might be constitutionally proscribed absent a warrant"). Further, given the continued advancement of technology and reduction of cost in "old technology," the "in general public use" doctrine may lose viability: but this is a question for a different day. Colin Shaff, *Is the Court Allergic to Katz? Problems Posed by New Methods of Electronic Surveillance to the "Reasonable-Expectation-of-Privacy" Test*, 23 S. Cal. Interdisc. L.J. 409, 448 (Winter 2014) (questioning

the *Katz* test and suggesting that "although new surveillance technologies may be superficially similar to preceding technologies, modern technology can produce a detailed and broad picture of an individual, entailing a very different violation of privacy than did the earlier technology").

In summary, the severe governmental intrusion into Mr. Vargas' privacy was an unreasonable search.[12] *See Nerber*, 222 F.3d at 600 (encouraging courts to consider the severity of the governmental intrusion when assessing whether an individual has a reasonable expectation of privacy). Because a warrant was not obtained to install and operate the video camera, and the USAO has not proffered any exception to the warrant requirement, the evidence obtained from the video surveillance is suppressed as the Fourth Amendment "requires adherence to judicial processes and . . . searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions." *Katz*, 389 U.S. at 357 (internal citations and quotations omitted); *see also Riley*, 134 S. Ct. at 2482 ("Such a warrant ensures that the inferences to support a search are 'drawn by a neutral and detached magistrate

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[12] A search warrant obtained for silent video surveillance must comply with the standards set forth in *United States v. Koyomejian*. 970 F.2d 536, 542 (9th Cir. 1992) (adopting four requirements, in addition to the probable-cause requirement, that a warrant seeking permission to conduct silent video surveillance must meet). *See also* Fed. R. Crim. P. 41(b).

instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.'" (internal citation removed)); *Payton v. New York*, 445 U.S. 573, 585 (1979) ("Unreasonable searches or seizures conducted without any warrant at all are condemned by the plain language of the" Fourth Amendment.). In addition, because the search warrant subsequently obtained on May 14, 2013, to search Mr. Vargas' home and property was based on the information obtained from the video surveillance, the evidence discovered pursuant to the execution of the search warrant is suppressed.[13] *See Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963) ("fruit of the poisonous tree").

C. Conclusion

For the above-given reasons, **IT IS HEREBY ORDERED:** Defendant's Motion to Suppress Evidence from Continuous Video Surveillance Pole Cam, **ECF No. 47**, is **GRANTED**.

IT IS SO ORDERED. The Clerk's Office is directed to enter this Order and provide copies to counsel and the U.S. Probation Office.

DATED this 15th day of December 2014.

s/Edward F. Shea
EDWARD F. SHEA
Senior United States District Judge

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[13] Because the evidence obtained from the use of the video camera is suppressed, the Court does not analyze whether the USAO has a duty under Federal Rule of Criminal Procedure 16(a)(1)(E)(i) and *Brady v. Maryland*, 373 U.S. 83 (1963), to disclose the technical details of the video camera.